THE GROWTH AND DEVELOPMENT OF THE POLICE POWER OF THE STATE

THE police power of the state is one of the most difficult phases of our law to understand, and it is even more difficult to define it and to place it within any bounds. In speaking of this power the court has recently said:

> "It extends not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity. * * * It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government."[1]

The term is nowhere found in our Constitution, and it first appears in our jurisprudence slightly less than one hundred years ago. It found no place in BOUVIER'S LAW DICTIONARY until 1883, and the UNITED STATES DIGEST did not contain it until 1879. Yet the idea is an old one and played no unimportant part in our Constitutional Convention.

The idea is embodied in our theory of dual sovereignty. The framers of our Constitution were close students of Blackstone, and from him they had learned the lesson of divisible sovereignty. Due to the peculiar situation in which they were placed, in that they were attempting to unite thirteen distinct sovereignties into one nation, they found it not only right but necessary that sovereignty should should be divided. It was fortunate that the state constitutions, whether they were survivals of colonial days or not, were all made with the idea of operating under some form of external authority. The common interests alone were committed to the general government, and the 'residual sovereignty' which remained with the states was the seed from which has grown the immense powers of 'Eminent Domain' and the 'Police Power.' It has been fittingly said that the police power—

> "was so named by Chief Justice Marshall * * * as a result of the perception * * * of the truth that in spite of all constitutional limitations from the side of the central govern-

[1] Eubank v. Richmond, 226 U. S. 137.

> ment there must remain in the states an indefinite fund of legislative and governmental power to provide for the countless actual and conceivable emergencies of local government."[2]

The idea of the police power is very clearly found in the FEDERALIST.[3]

> "In this relation (operation of the government) the proposed government cannot be deemed a national one, since its jurisdiction extends to certain enumerated objects only, and leaves to the states a residuary and inviolable sovereignty over all other objects."

says Madison.[3] This 'residual sovereignty' was rightly left with the states, but it was never intended that this sovereignty residing in the states should ever override any one of those fundamental guarantees set down in the Constitution. Absolute sovereignty belongs to neither nation nor state, and should either encroach on the limits of the other the basis of our government is weakened.

The term police power is not found in the court decisions until 1827, but the idea was clearly in the mind of the Chief Justice when he delivered the decision in the *Dartmouth College Case*.[4] In this decision he said:

> "The framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions adopted for internal government, and that the instrument they have given us is not to be so construed is admitted."

Again, in the great commercial case of *Gibbons* v. *Ogden*[5] he said:

> "The acknowledged power of the state to regulate its police, its domestic trade, and to govern its own citizens may enable it to legislate on this subject to a considerable extent."

Three years later, in 1827, the case of *Brown* v. *Maryland*[6] was

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[2] Hastings, "The Development of Law as Illustrated by the Decisions Relating to the Police Power of the State," PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY, 1900, No. 39, p. 379.

[3] Number 39.

[4] 4 Wheat. 518.

[5] 9 Wheat. 1.

[6] 12 Wheat. 419. This case had to do with the validity of a law requiring an importer to take out a license from the state before he could sell an

decided. Taney's ingenious argument, that to hold the law in question unconstitutional would not only strike a blow at the taxing power of the state, but would seriously endanger a state's power to protect itself from dangerous imports such as gunpowder, was not easily answered. Here we are not interested in Marshall's reply to the first point, but in answer to the second he said:

> "The power to direct the removal of gunpowder is a branch of the police power which unquestionably remains and ought to remain with the states."

Here for the first time we meet the term police power, and it is used to emphasize the doctrine of 'residual sovereignty' applying to those cases where the public is to be protected. The term was not taken into immediate use, and we do not find it accepted immediately by politicians or judges. In Mr. Calhoun's famous resolutions of December, 1837, he has the idea, but he does not use the term. In discussing the relation between slavery and the Union, and in seeking for a solution to the already burning question, he proposed that,

> "Any intermeddling of any one or more states, or a combination of their citizens, with the domestic institutions or police of the others on any ground, political, moral, or religious, should be deemed unconstitutional."[7]

In fact, not until the same year, ten years after it had first been used, do we meet the term again. In the case of *Mayor of City of New York* v. *Miln*[8] we find Justice Barbour quoting Marshall's own words. But while he quotes the former statement he does not adopt the term generally, although he entirely accepts the idea of police

article which had been imported. Such a law Chief Justice Marshall decided to be unconstitutional on the ground that it was a tax on imports, and as such forbidden by the Constitution. This case is also of interest because in it the 'original package doctrine' was first formulated.

[7] Schurz, HENRY CLAY, Vol. 2, p. 156.

[8] 11 Pet. 102. The question before the court was whether an act, providing that the master of every ship entering New York should render, within twenty-four hours after arrival, a statement of name, age, etc., of all alien passengers, and placing a fine upon his failure to do so, was constitutional.

power.[9] The end desired by the law in question was to prevent the influx of paupers and criminals, and the means as given by law is upheld on the basis of protecting the safety, happiness, prosperity, and general welfare of the people. Judge Barbour goes so far as to say that all state legislation having this high purpose in view "is complete, unqualified, and exclusive." That the term was used in this case by mere accident seems evident when we consider that at the same term of court was decided the important case of *Charles River Bridge* v. *Warren Bridge*,[10] in which the term does not appear. But beginning at about this time it became widely used and has since then occupied an important place in our jurisprudence.

It may be asked why did the term and the idea meet at this time with such popularity? The answer is to be found in the condition of the country at that time. The new Jacksonian party had come into power in 1828, and with it had come the doctrines of the frontier. New economic problems had to be faced, and the slavery question had become the storm center of the time. But with the coming of Jackson the Supreme Court had remained Federalist, and the controlling hand of John Marshall still rested on our judicial system. Between 1834 and 1837 the court had changed. Taney had become Chief Justice, Wayne had taken Johnson's place, and Barbour had succeeded Duval. The last stronghold of Federalism had fallen. Marshall had heard the last two mentioned cases argued, but because four judges had not concurred a rehearing had been ordered. According to Story, Marshall judged the laws in question to be unconstitutional, yet they were upheld by the new court as being proper state enactments. This sudden change on the part of the court naturally attracted attention from the public at large, and

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[9] In this connection the court says: "A state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation where that jurisdiction is not surrendered or restrained by the Constitution of the United States; that by virtue of this it is not only the right but the bounden and solemn duty of a state to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem conducive to these ends where the power over particular subjects or the manner in which exercised is not surrendered or restrained in the manner just stated."

[10] 11 Pet. 420.

we find not only Congress but the papers speaking of the police power.

The real reason for adopting the police power lay deeper; it lay in the great slavery controversy. Not so many years previous the New England states had met in the Hartford convention, and threats of secession had first been brought forth. But during the intervening years the North had gained numerically, and they were now in control. Moreover, they had been thrilled by Webster, and had adopted his doctrine of an indissoluble Union. They had to find some theory with which they could combat the Southern States Rights doctrine, and yet they believed in the 'residual sovereignty' of the states. So when the court offered its police power to pacify the 'disturbing spirit of slavery,' the North took it for its own. Indeed, it has been said that "The term police power was almost as much a federalist and a northern expression as state sovereignty was anti-federalist and southern."[11] Because most of the early cases dealing with the police power involved commerce does not prevent this from being true. Neither the South nor the courts were anxious to have the question discussed at bar, but those cases which did arise were decided by the court as undoubtedly the framers of our Constitution would have decided them. To a discussion of two of these cases we will now turn.

The case of *Prigg* v. *Pennsylvania*[12] contains the next reference to police power by our Supreme Court. The case brought before the court the fugitive slave law and a state's right to legislate on this subject. The court agreed unanimously that the law by which the plaintiff had been indicted and found guilty of removing a slave by force from Pennsylvania to Maryland was unconstitutional; but what they failed to agree on was whether the right of concurrent legislation on this subject, so long as it was not contrary to any act of Congress, rested with the states. Judge Story delivered the opinion of the court, and having held that the Constitution recognized property in slaves, he denied a concurrent power on the part of the states, but he expressly says that the court recognizes and will protect the police power.[13] Taney's concurring opinion denies the

[11] HASTINGS, *supra*, p. 377.

[12] 16 Pet. 539.

[13] "We are by no means to be understood in any manner whatsoever to doubt or interfere with the police power belonging to the states in virtue

exclusiveness of Congress to legislate on the question of fugitive slaves, and he also discusses the question with reference to the police power. We are not interested here in the question of the exclusiveness of Congress' commercial power, but the question of interest is whether such legislation on the part of the states should be upheld as being an exercise of the police power or as being a concurrent commercial power residing in the states. In discussing results which would follow should the states not be permitted to legislate as to fugitive slaves, Taney says:

> "It seems supposed that laws nearly similar to those I have mentioned might be passed by the state by virtue of her powers over her internal police, and by virtue of her right to remove from her territory disorderly persons."

Thompson, as did Daniel, thought that a state had concurrent power over this subject. Justice Wayne took an opposing position.[14] McLean's position is uncertain, as he devotes himself to the question whether the purpose of the article in question was to protect the slaveholder, and that if this is so an injustice would be worked if the enforcement of it was left in the hands of hostile states. The court virtually decided to call this power by which a state acted on fugitive slaves the police power, and they aligned it with Madison's 'residual sovereignty.'[15]

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of their general sovereignty. That police power extends over all the subjects within the territorial limits of the states * * * and * * * is entirely distinguishable from the right and duty of claiming and delivering slaves which comes from the general government."

[14] Thompson does not discuss the relation of the subject to the police power. Daniel, and here I follow Hastings, freely uses the term police power, and "calls attention to the fact that dealing with a fugitive merely as such, so long as he neither disturbs or threatens the domestic tranquility, is a matter of foreign relations and not of police." "Under such circumstances he would not be a proper subject for the exertion of the police power. If not challenged under a different power of the state, his escape would be inevitable." "If arrested by the exercise of the police power he would, as far as he was subjected to that power of the state, be taken out of that of his master, and thus the invocation of this police power, so far from securing the rights of the master, would be made an engine to insure the deprivation of his property." Wayne mentions the police power only in denying to the states all right of legislation over this subject except such "as may be of strictly police character."

[15] In the discussion of Prigg v. Pennsylvania I have followed Hastings' excellent analysis.

The case of *Moore* v. *Illinois*[16] came up in 1852. A law providing that no one should harbor a slave or prevent the master from retaking him was upheld as being a "regulation for the restraint and punishment of crime, for the preservation of the health and morals and the public peace."[17] Here we have a peculiar situation:

> "A state law that forbids harboring a slave is due exercise of the police power. A state law that forbids a master from taking his slave and removing him by force out of the commonwealth without the exhibition of some legal process is not. And the distinction is to be sought in the nature of a power exercised in each case."[18]

The great controlling power of the national government over the people is exercised through the grant of commercial power, that of the states is exercised by the police power. While the court tries to ascribe separate fields to each, the attempt has never been successful and the two are continually coming into conflict.

Two early cases involved in this struggle are of great interest and importance, for we see in them the general attitude of the court toward the police power. The *License Cases*[19] involved the question of the constitutionality of laws requiring a license to sell liquor. As in the case of *Prigg* v. *Pennsylvania,* the decision was unanimous, and again the judges were unable to decide on any common reason upon which they could base their decisions. The court was unanimous in its decision that these laws were constitutional, but they had the difficulty which will always confront a body of men

[16] 14 How. 13.

[17] Wayne went on to say: "In the exercise of this power, which has been denominated the police power, a state has a right to make it a penal offense to introduce paupers, criminals or fugitive slaves within their borders, and to punish those who thwart this policy by harboring, concealing or secreting such persons." He does not enter into a discussion of concurrent power; he refrains from it when he says: "That the defendant is thus subject to two punishments, one by the state and another by the nation, is not a good objection, as he is subject to two sovereignties and his act is a violation of the laws of each and therefore constitutes two offenses." Justice McLean dissented on the ground that since Congress has control over fugitive slaves the whole question is removed from the police power of the state.

[18] HASTINGS, *supra,* p. 404.

[19] 5 How. 504.

who feel that they are especially chosen to regulate the relation of discordant states, when they are suddenly called upon to fix practical rights. They were satisfied that the measures were passed by virtue of the police power, but again the real question was whether the states had a concurrent power over commerce. Taney admits such concurrent power.[20] McLean advances an entirely new theory, and one which is scarcely tenable. He argues that the spheres of the nation and the state are different, and that within its own sphere each is supreme. So he thinks that these laws are in no sense regulations of commerce.[21] With him agrees Justice Grier. Justice Catron agreed with the Chief Justice, while Daniel and Woodbury deny any power of concurrent legislation in the states. Taney's

[20] Taney is emphatic in his belief that the states have some power over this subject, so long as they do nothing contrary to an act of Congress. In referring to Gibbons v. Ogden he says: "Moreover, the court, on pages 205, 206, distinctly admits that a state may in the execution of its police and health laws make regulations of commerce, but which Congress may control. It is very clear that so far as these regulations are merely internal, and do not operate on foreign commerce or commerce among the states, they are altogether independent of the power of the general government and cannot be controlled by it." In other words, he believes the laws to be regulations of commerce, and as such subject to the control of Congress. Later he asks: "What are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominion, and whether a state passes a quarantine law or a law to punish offenses * * * or to regulate commerce within its own limits, in every case it exercises the same power: that is to say, this power of sovereignty, the power to govern men and things within the limits of its own dominion. It is by virtue of this power that it legislates, and its authority to make regulations of commerce is as absolute as its power to pass health laws, excepting so far as it has been restricted by the Constitution of the United States."

[21] "A license to sell an article, foreign or domestic, as a merchant, an innkeeper or a victualer, is a matter of police and revenue within the power of a state." In speaking of the police power and the power of Congress, he says: "Neither of them can be so exercised as to materially affect the other. The sources and objects of these powers are exclusive, distinct and independent, and are essential to both governments. The one operates upon foreign commerce, and the other upon the internal concerns of a state * * * and if the foreign article be injurious to the health, safety or morals of the community, the state may, in the exercise of that great and conservative police power which lies at the foundation of its prosperity, prohibit the sale of it. * * * Such a regulation must be made in good faith and have for its sole object the preservation of the health or morals of society."

view seems to be the most practical in that it does not tend toward separatism. If the police power is the only authority by which the states can legislate, and if it is absolute, every enactment is an exercise of it, and continual clashes with congressional laws are inevitable. His decision does not, however, give the sharp distinctions which the people at that time wanted, and it left the relation of state and nation as undecided as before.[22]

This debate was continued two years later in the *Passenger Cases*.[23] These cases arose because of a law of New York authorizing a tax on every person landing in New York City, the tax to go to the support of the marine hospital; and because of a Massachusetts regulation providing that officers be appointed to prevent and idiot or person incompetent to earn a living from entering the state, unless bond be given that such person would not become a public charge within ten years. In an opinion by Justice McLean, the court decided that such laws were unconstitutional. The Justice still holds to his theory of different spheres, here on the basis that to suppose the power of the states to be subordinate to the power of the nation "degrades the states by making their legislation to the extent stated subject to the will of Congress." But by dwelling on the subject of conflicting legislation he adds force to Taney's argument that the spheres cannot be separate, and at the same time the validity of state legislation be made to depend upon its conformity to the legislation of Congress. That the police power and the commercial power are different he feels sure.

> "No one has yet drawn the line clearly between the commercial power of the Union and the municipal power of a state."[24]

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[22] In concluding his discussion of this case, Hastings says: "To appreciate the importance attached to every shred of power by the adherents of state and national authority, respectively, the steadily growing slavery discussion and sectional bitterness must be kept in mind. The license cases are almost precisely contemporary with the Wilmot proviso, and the mission of Mr. Samuel Hoar to South Carolina as agent of the commonwealth of Massachusetts to look after the interests of colored seamen, her citizens, seized from their vessels in Charleston harbor. He left the city on the advice of the city and state authorities that he was not safe, and they could not or would not protect him."

[23] 7 How. 283.

[24] In referring to the relation of police power and taxation, McLean

Justice McLean then finds an exclusive commercial power and an exclusive police power, and he depends upon the ingenuity of the court to separate them should they become entangled. Little wonder that four judges could not accept such a task at a time of such ardent and heated popular discussion over the status of the states. Justice Taney finds that the right of expulsion includes the right of exclusion, and in quoting *New York* v. *Miln* he holds that the states have such taxing powers as these laws give.[25] Only Justices

says: "The police power of the state cannot draw within its jurisdiction objects which lie beyond it. * * * In guarding the safety, health and morals of its citizens a state is restricted to appropriate and constitutional means. If extraordinary expenses be incurred an equitable claim to an indemnity can give no power to a state to tax objects not subject to its jurisdiction." Justices Wayne, Catron, McKinley and Grier filed concurring opinions. Justice Wayne proclaimed that the states have no concurrent power over commerce. In replying to the statement that these laws were passed by virtue of the police power, he asks: "What is the supreme police power of the state? It is one of the means used by sovereignty to accomplish that great object, the good of the state. * * * Police powers, then, and sovereign powers are the same. The former being considered as so many particular rights under that name or word collectively placed in the hands of the sovereign. * * * How much of it have the states retained? I answer unhesitatingly, all necessary to their internal government. Generally, all not delegated by them in the articles of confederation to the United States of America; all not yielded by them under the Constitution of the United States." Justice Catron merely finds these laws a tax on commerce, and Justice Grier concurs with him. Justice McKinley thinks that the question of immigration and immigrants is solely in the hands of Congress.

[25] Taney closes with a remarkable assertion of the rights of the general government: "For all the great purposes for which the federal government was founded we are one people with one common country. We are all citizens of the United States, and, as members of the same community, must have the right to pass and repass through every part of it without interruption as freely as in our own states; and a tax imposed by a state for entering its territories or harbors is inconsistent with the rights which belong to the citizens of other states as members of the union, and with the object which that union was instituted to attain. * * * But upon the question that the record brings up the judgment in the New York case, as well as that in Massachusetts, ought, in my opinion, to be affirmed." Justices Daniel, Nelson and Woodbury agreed with the Chief Justice in his conclusion. Justice Woodbury's opinion is of importance because he suggested the principle adopted a few years later in the case of Cooley v. Board of Wardens (12 How. 299), that the power of Congress over commerce is exclusive only when a uniform rule is necessary.

Taney and Woodbury fully realized that the two powers, different though they were, must conflict at times, and the only way to harmonize them was to make that of commerce supreme and paramount. This we have accepted, and we can only account for the court's earlier action by remembering that the great sectional strife was connected with these decisions and that the policy of the court was one of mildness and temperance.

We have gone far enough to see that the development of the police power leads into many different fields, that it is a power not to be enclosed within any narrow limits, but that it is a broad and comprehensive power, extending into every phase of our jurisprudence. This makes it very difficult to treat of the police power in any one phase, and to show how this police power in its development has affected the rights of states and citizens. But unless we are to be completely lost in the labyrinth through which the police power has gone it is necessary to discuss separately the relation of the police power to those rights upon which it has had the most influence. With this in view, I have undertaken to point out the main effects of the police power on

1. The Obligation of Contract;
2. The Interpretation of the Fourteenth Amendment;
3. Race Legislation;
4. The Relation of Employer and Employee.

It must not be thought that there are distinct barriers between these different subjects. In many cases they overlap, but by treating of them separately we shall come to a clearer knowledge of the growth of the police power and what it at present means.

Relation of the Police Power to the Obligation of Contract

Chief Justice Marshall has had an immense influence on our country. His opinions in many cases stand today and are quoted with the most profound respect. Perhaps no decision of his has had a deeper influence on our law than that rendered in the *Dartmouth College Case*.[26] It is unnecessary to take up either the facts or the argument of this important contractual decision. The doctrine advanced in the decision still stands, limited only by the police power. The decision itself fastened upon us the doctrine of cor-

[26] 4 Wheat. 518.

porate inviolability, but Marshall's admission that the states are not restrained in regulating their "civil institutions adopted for internal government" has limited the above doctrine.

The case of *Charles River Bridge* v. *Warren Bridge*[27] marks the first step in limiting the doctrine of the *Dartmouth College* case. Here it was held that while a charter is binding yet it carries with it no exclusive right beyond that expressly stated, and that in interpretation a charter is to be considered as carrying nothing by implication.

The first step taken by our courts in placing limits upon the inviolability of contract by virtue of the police power was in the case of *Thorpe* v. *Rutland & B. R. Co.*[28] In this case the court held that a state may legally add additional duties to those prescribed in a charter, provided these restrictions are made by virtue of the police power. The coming of the war and the reconstruction put a stop to cases involving contractual rights, and it was not until 1877 that we again meet an important contractual decision. As we shall see, the court had become thoroughly familiar with the doctrine and name of the police power, and from this time the con-

[27] 11 Pet. 420.

[28] 27 Vt. 140 (1855). The question at issue was whether a state might require railroads to fence their tracts and put cattle-guards at all crossings, if such restrictions were made after a charter, which had no such provisions, had been granted. The court found that control over railroads in this respect existed in the state legislature by virtue of "the general control over the police of the country." That this is "a responsibility of which the legislatures cannot divest themselves, if they would." The "police power of the state" is found to extend "to the protection of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the state"; that with regard to railroads "this police power, which resides primarily and ultimately in the legislature, is twofold": first, "the police of the roads" exercised by the railroads themselves in absence of "legislative control"; second, "the general police power of the state, by which persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the state. Of the perfect right in the legislature to do which no question ever was or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned." And as the court had already shown that a railroad company has no more rights than an individual, the same applies to railroad companies. The court grants that a franchise is private property, and its right of protection as such, but it is firm in refusing to adopt a construction which would put corporate interests beyond legislative control.

test between the inviolability of contract and the police power becomes a deadly one.

Two cases decided in this year introduce the question whether or not a state by granting charters, and thus establishing contractual relations, can bargain away its police power. The case of *Beer Co.* v. *Massachusetts*[29] brought forward the liquor question again. The company had been granted its franchise as a brewing company years before, and when a prohibitory liquor law was passed it claimed that the state was destroying its franchise by forbidding the sale of its product in Massachusetts. The court decided that the state, having reserved the right to alter or repeal the franchise, might forbid the sale of the product; and further, that a state could not bargain away its right to control liquor, the control of which falls under the police power. The case of *Fertilizing Co.* v. *Hyde Park*[30] carried this principle into a new field. The company had been granted a charter to locate and carry on business for fifty years. Their land finally came within the village of Hyde Park, and the village forbade the company to carry their materials through the streets. This ordinance was upheld. The court pointed out that there was no provision preventing such an ordinance, and had there been one it would probably be void as an illegal limitation on the police power.

The point in question was decided in *Stone* v. *Mississippi*.[31] The state had granted a franchise to conduct a lottery for twenty-five years, and for this she had been paid. Afterward a new constitu-

[29] 97 U. S. 25.

[30] 97 U. S. 659.

[31] 101 U. S. 814. In rendering the decision in this case Chief Justice Waite said: "The doctrines of Trustees of Dartmouth College v. Woodward announced by this court more than sixty years ago have become so imbedded in the jurisprudence of the United States as to make them to all intents and purposes a part of the Constitution itself." We can only reconcile this statement to the decision rendered here by remembering that the earlier case does not refer to any act which could be based on the 'residual sovereignty' residing in the states, and by remembering that Chief Justice Marshall really prepared the way, though unknowingly, for the latter development, when he said: "The framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions adopted for internal government, and that the instrument they have given us is not to be so construed is admitted."

tion had been adopted forbidding lotteries. The court quoted the two previous cases and held that a state cannot be limited by such a contract and that no contract of a state can limit the police power.[32] *Stone* v. *Mississippi* did not survive without some limitations. The old struggle was brought up again in 1885 in the cases of *New Orleans Gas Co.* v. *Louisiana Light Co., Louisville Gas Co.* v. *Citizens Gas Co.,* and *New Orleans Water-Works Co.* v. *Rivers.*[33] In the first two cases exclusive franchises for laying gas mains and supplying gas to the city had been granted; in the last an exclusive franchise was granted for supplying water. Had the court followed the precedent established in *Stone* v. *Mississippi,* the injunctions to prevent other people from laying the gas mains or water pipes would not have been granted; but the injunctions were granted on the basis that the first franchises were binding contracts. It is conceded that the supply of light and water is included in the 'widest definition' of the police power. What then did the court mean? How could these injunctions be granted when the court had expressly stated that the police power could not be bargained away? It is admitted that the supply of gas and water has relation to health and even to morals, but this connection is held to be too slight to restrain the application of the *Dartmouth College Case.*[34]

Under these decisions we have two kinds of police power: first, that which is closely connected with the public health, safety, and morals cannot be bargained away; second, that which has to do with the general welfare can be alienated. A number of cases arose to which this principle was applied.[35] The second point above was

[32] The rule of Stone v. Mississippi was very emphatically upheld in the case of Butchers Union Company v. Crescent City Company, 111 U. S. 746. One legislature had granted an exclusive franchise to the Crescent City Company; a few years later another legislature repealed this grant. In the Slaughter-House cases the first act had been upheld; now the Supreme Court upheld the second act. Slaughter-houses were judged to be fit objects of legislative control, and the court held that a legislature could not be bound by an exclusive franchise granted by a previous legislature.

[33] 115 U. S. 650, 683, 674.

[34] It seems as if the supply of water and gas would have as close a relation to public health and morals as butchering, but Justice Harlan says that the original franchise in the Butchers Union Company case was upheld merely as a police regulation, and as such it was repealable.

[35] New Orleans v. Houston, 119 U. S. 265. The court decided that

amended in the case of *Home Telephone Co.* v. *Los Angeles.*[36] The telephone company had a franchise extending for a long period of years. The city reduced the rates below those established by the franchise. When the case reached the Supreme Court it was held that the rates could be reduced because the franchise had been granted for too long a time. In other words, that portion of the police power which refers to the general welfare cannot be alienated for too long a period, but no length of time was set, and it was but a few years before the court came back to the principles of *Stone* v. *Mississippi.*

This principle was reëstablished in the case of *Atlantic Coast Line R. Co.* v. *Goldsboro.*[37] The railroad company had been granted certain rights by the city of Goldsboro, and these rights were later withdrawn. In upholding this ordinance, Justice Pitney, speaking for the court, said:

> "For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably

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while a state could not bargain away its right to abolish a lottery, it could do away with its right to tax it, and that on the matter of taxation the rule of Stone v. Mississippi did not apply. St. Tammany Water-Works Company v. New Orleans Water-Works, 120 U. S. 64. Gas and water companies may enjoin their franchises against any exercise of the police power. To this extent the obligation of contract won over the police power. Otis v. Parker, 187 U. S. 606. The court upheld a provision in the California State Constitution making void all contracts for the sale of corporate stock on margin or for future delivery, and authorizing a recovery of any money paid on such contracts. "If the state thinks that an admitted evil cannot be prevented by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it is a clear, unmistakable infringement of rights secured by fundamental law." Dobbins v. Los Angeles, 195 U. S. 223. The facts of the case are similar to those of Fertilizing Company v. Hyde Park, only here we have a gas company. The court held that the city could not by virtue of the police power of the state attack the gas company, but it said that the "right to exercise police power is a continuing one, and a business lawful today may because of a changed situation become a menace to public health and welfare and be required to yield to public good." Here we have an intimation that the second point in the gas and water cases will be changed.

[36] 211 U. S. 265.

[37] 232 U. S. 548.

> necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

Words more sweeping have seldom been used. The only protection that is left to vested rights is found in the court's review of the reasonableness of legislation.

One more case is worthy of notice, that of *Union Dry Goods Co.* v. *Georgia Public Service Corporation.*[38] The service corporation had contracted to supply light to the dry goods company for five years. The rates were raised, and judged to be reasonable by the State Railroad Commission. The Supreme Court sustained the rates. After citing a number of cases, Justice Clarke said:

> "These decisions, a few from the many of like effect, should suffice to satisfy the most skeptical and belated investigator that the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the state."

The decisions mentioned cover 100 years—at one end we have the *Dartmouth College Case* declaring for corporate inviolability; at the other, the *Union Dry Goods Case* making the 'Obligation of Contract' almost subservient to that vast state power, the Police Power. The various acts by which the cited cases arose are not materially different, the interpretation has changed. It would seem that those who hold that the Supreme Court is, in the final analysis, a law-making body are correct.

Relation of the Police Power to the Interpretation of the Fourteenth Amendment

During the War between the States there was little development of the subject of which we are treating. But immediately afterward the question of the status of the Southern States arose. The Thirteenth Amendment had been passed in December, 1865. This prohibited slavery or involuntary servitude except in case of punishment for crime. The majority in Congress had become accustomed

[38] 248 U. S. 372.

to the assertion of authority, and when they realized that they were failing "to reap the results of the war," and that President Johnson was following the plan of Lincoln in restoring the Southern States to their constitutional status, the Civil Rights Act of 1866 was passed. This bill

> "was a plain announcement to the Southern legislatures that, as against their project of setting the freedmen apart as a special class, with a status at law corresponding to their status in fact, the North would insist on exact equality between the races in civil status, regardless of any consideration of fact."[39]

This bill was vetoed by the President, and then passed over his veto. In order to assure it of constitutionality, the Fourteenth Amendment was passed by Congress, and in a most questionable fashion it was ratified by the states. The first section of this amendment is the one in which we are interested.[40]

Before we take up the interpretation of the Fourteenth Amendment with reference to the police power, a slight digression will be helpful. Probably the primary reason for the adoption of the Constitution was a determination to guarantee the property right. Most of the recent cases involving this right of ownership have arisen under the Fourteenth Amendment, but there was one early state decision worthy of note.

The state courts were late in adopting the term police power; they held to the old common law doctrines. The second state decision in which the term police power was used is *Commonwealth* v. *Alger*.[41] This case, Hastings says,

> "furnishes a starting point for citations directly relating to the police power in most of the constitutional discussions that embrace the subject."[42]

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[39] DUNNING, RECONSTRUCTION, POLITICAL AND ECONOMIC, p. 63.

[40] The first section reads as follows: "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

[41] 7 Cush. (Mass.) 53 (1851).

[42] HASTINGS, *supra*, p. 418.

The question referred to the relationship of private real estate and general welfare. A law had been passed by Massachusetts which forbade the erection or placing of any materials for a wharf in Boston harbor. The defendant had been found guilty of violating this provision, and he brought the case before the supreme court of the state, and argued that the wharf was on his land and would not interfere with the right of way of ships. Justice Shaw decided that the law was a valid exercise of the police power, and in this connection he said:

> "We think it is a settled principle, growing out of the nature of well-ordered society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. * * * The power we allude to is rather the police power, the power vested in the legislature by the Constitution, to make * * * laws * * * not repugnant to the Constitution as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same."[43]

We now return to the Fourteenth Amendment. The judges were sympathetic with the results of the war in so far as they established the principles of territorial sovereignty, but they were not ready to see the states become powerless and the whole theory of our Constitution destroyed. Fortunate indeed were we in having such a man as Justice Miller, who in a time of great national disturbance was able to foresee the inherent danger of this new amendment, and who had the courage to place himself in the path of radicalism and check it.

The first cases to arise under the amendment were the *Slaughter-House Cases.*[44] The State of Louisiana had created a corporation, the Crescent City Live Stock Landing and Slaughter House Com-

[43] Again he says: "But he is restrained, not because the public have occasion to make like use or any use of the property, or to take any benefit or profit to themselves from it, but because it would be a noxious use contrary to the maxim, *'Sic utere tuo, ut alienum non laedas.'*"

[44] 16 Wall. 18.

pany, to which it granted a monopoly within New Orleans of the landing and slaughtering of animals for food. The company could permit any other person to kill animals in their slaughter-houses, and a maximum charge was set. The butchers of New Orleans contended that the law "abridged" their "privileges and immunities" as "citizens of the United States." This law was upheld by a bare majority of one, Justice Miller rendering the decision. Justice Miller says that the amendment might be so construed as to leave the states the "mere shell of legislative power." He then reviews the history of the adoption of the reconstruction amendments. Next he turns to the really important point. He decided that there is a line between state citizenship and national citizenship; that the Fourteenth Amendment gave no added protection to the citizens of the states as such.

> "Its sole purpose was to declare to the several states that whatsoever those rights as you grant or establish them for your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same neither more nor less shall be the measure of the rights of citizens of other states within your jurisdiction."

This simply extended to the citizens of the United States the protection given to citizens of the other states as contained in Article 4, Section 2, Clause 1, of the Constitution.[45]

The real point here was, granting that this law establishes a monopoly which violates common right, does the Supreme Court under the Fourteenth Amendment have authority to deal with it, and is such state action forbidden by the amendment? The majority answered this question in the negative.[46] This decision rendered valueless the 'privileges and immunities' clause in extending the

[45] This clause reads as follows: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

[46] The dissenting judges undoubtedly interpreted this amendment as the framers of it had intended. It was passed in order to prevent a state from passing any hostile legislation toward any class. Justice Field's dissenting opinion is strong and follows this idea. He argued that the amendment protected the rights of all citizens of the state by virtue of their being citizens of the United States. Had this principle been adopted, and a broad construction rendered, the police power of the state would have been destroyed. The court seems to have remembered Madison's statement that

national power at the expense of that of the states.[47] As a result, attention was turned to the other provisions, and in interpreting these the Supreme Court has not been slothful in allowing room for the police power.

The attention of the court was now turned to the question of the legality of a state regulating the rates of railroads and private businesses. In this field we meet the most important development of the police power under the Fourteenth Amendment. Before taking up the main cases on this point it will be well to mention two cases that arose soon after the *Slaughter-House* decisions. In *Railroad Co.* v. *Fuller,*[48] the court held that it was not illegal for a state to require a railroad to post its rates once a year and to force the railroad to abide by them. Such legislation is a valid exercise of the police power.[49] And in *Railroad Co.* v. *Maryland*[50] the court decided that the state, in granting a franchise to the Baltimore & Ohio to construct a branch from Baltimore to Washington, had the power to say what rate could be charged, and furthermore the state could require a certain per cent of the passenger charges to be paid to it, for the railroads are the work of people who receive their authorization from the state.[51] Justice Bradley always held that regulation

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"if they (the states) were abolished, the general government would be compelled, by the principle of self-preservation, to reinstate them in their proper jurisdiction." FEDERALIST, No. 14.

[47] In the case of Bartemeyer v. Iowa, 18 Wall. 129, the principle of the Slaughter-House cases was upheld. The defendant had been convicted of selling liquor. He appealed the case and argued that he had owned the liquor prior to the date when selling was made illegal, and that as a citizen of the United States he was deprived of his 'privileges and immunities' as guaranteed by the Fourteenth Amendment. Justice Miller gave the decision, and he again made the distinction between state and national citizenship, declaring that the conviction was warranted.

[48] 17 Wall. 560.

[49] In this connection Judge Swayne said: "It is not in the sense of the Constitution in any wise a regulation of commerce. It is a public regulation, and as such forms a portion of the 'immense mass of legislation which embraces everything within the territory of the state and not surrendered to the general government,' all which can be most advantageously exercised by the states themselves." He admits that there is concurrent power which when exercised by the states must be called "police power," and when exercised by Congress "commercial power."

[50] 21 Wall. 456, 470.

[51] With regard to the state charging a certain per cent, Justice Bradley

of such rates was a question for the states, and that the reasonableness of the rates was a matter for the legislature to decide. We shall see this doctrine modified.

The case upon which our state rate regulation is based is *Munn* v. *Illinois*.[52] The question at issue here was whether or not the state legislature might regulate the maximum charges for storage of grain in cities. It was argued that such a law deprived the owners of their property and denied to them 'the equal protection of the laws.' This case is of particular interest because in it Chief Justice Waite gives to the police power an historical definition. He argued that the principles of the Fourteenth Amendment are as old Magna Charta and form a part of all state constitutions; that the state legislatures possess the supremacy of Parliament in so far as they are not limited by the Constitution, and such regulations are not within the limitations. Two main principles were laid down in this case: the legislature of a state may, through its police power, regulate the charges of a business affecting public interest; and the question of the reasonableness of these rates is one for the legislature to decide. This leaves to the Supreme Court the question of whether the business is public in nature.[53]

We have noticed how in the early railroad cases the police power was adjudged not to violate the commerce clause. This victory was not of long duration. In 1886 the case of *Wabash, St. Louis & P.*

says: "It has discretion as to the amount of that compensation; that discretion is a legislative, a sovereign discretion, and in its very nature is unrestricted and uncontrolled."

[52] 94 U. S. 113.

[53] The other Granger cases were decided on the same principles. In Chicago, Burlington & Quincy Ry. Co. v. Iowa, 94 U. S. 155, a law establishing maximum rates was upheld. The law was resisted as impairing the contract in the charter, and for the reasons urged in Munn v. Illinois. Since no immunity was given in the charter, the court decided that no immunity could be implied. The court further said: "This road, like the warehouse in that case [Munn v. Illinois], is situated within the limits of a single state. Its business is carried on there and its regulation is a matter of domestic concern. It is employed in state as well as in interstate commerce, and until Congress acts the state must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without may be indirectly affected."

Ry. Co. v. *Illinois*[54] came before the court, and in the decision we find the first shift from the position adopted in the earlier cases. Here it was decided that no state could regulate the charges of transportation of goods taken beyond the state, and that they could not even regulate the charges for the distance carried in the state.[55] In the case of *Robbins* v. *Taxing District of Shelby County*[56] it was held that the only way in which a state can act on interstate commerce is through its police power. But this does not extend to the laying of a tax with the view of preventing anyone from exercising his right of engaging in interstate commerce.

The victory of commerce over police power went still further. In the case of *Bowman* v. *Chicago & N. W. Ry. Co.*[57] the court held that a state's police power did not extend to the point of interference with the right of a man in another state to ship liquor into the state. The fact that Congress had not regulated this subject was judged to mean that Congress had meant it to go unregulated, and unregulated it should go until Congress acted. And in *Kidd* v. *Pearson,*[58] although the same law was involved, the court held that the police power extended to the prevention of manufacturing of liquor within its own borders, although such liquor was to be sent to another state and there sold. There seems to be a strange inconsistency here, for in the second case police power applies to the regulation of that which in no way could harm the citizens of the state, while in the first case it does not apply to that which might easily harm them. The explanation lies in the paramount authority of Congress to regulate interstate commerce.[59]

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[54] 118 U. S. 557.

[55] An extension of this principle is found in the Shreveport Rate Case, 234 U. S. 342, where it was held that a railroad cannot charge lower rates per mile in a state than it does for interstate business, even though interstate rates have been decided reasonable, and intrastate rates are fixed by the State Commerce Commission.

[56] 120 U. S. 489.

[57] 125 U. S. 465.

[58] 128 U. S. 1.

[59] Just preceding these cases the Supreme Court had decided the case of Smith v. Alabama, 124 U. S. 465. Here a state law requiring an engineer to be examined and procure a license before he drove a locomotive within the state was upheld. Smith had violated this law, and he was engaged in interstate commerce alone; nevertheless, the law was judged to apply. The

The case of *Mugler* v. *Kansas*[60] really ended the fight of the liquor men against prohibitory state legislation. Here the court went to great length in showing the bad effect of liquor, and it decided that when the value of property was injured through a lawful exercise of the police power the damage was merely consequential. Two propositions were made clear: (1) that by the Fourteenth Amend-

court said: "There are many cases where the acknowledged powers of a state may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations. If their operation in such cases regulate such commerce so as to conflict with the regulation of the same subject by Congress, either as expressed by positive laws or implied from the absence of legislation, such legislation on the part of the state to the extent of such conflict must be regarded as annulled." It would seem evident that in a case of this nature the law in question refers to a condition where public safety is endangered, and that when this is the case a state may pass restrictions which affect interstate commerce. The court upheld the decision of Bowman v. Railroad Co. in Leisy v. Hardin, 135 U. S. 100, and to it they applied Brown v. Maryland, holding that the right to import involves the right to sell. Rahrer Case, 140 U. S. 545. Rahrer, as an agent, had sold liquor shipped from another state in the original package. Just before this the "Wilson Bill" had been passed. This bill provided that liquors from other states should be subject on arrival to the operation of the laws of the state into which they had been shipped. In speaking of the police power, Justice Fuller said that it is "The power to impose restraints and burdens upon persons and property in the conservation and promotion of public health, good order and prosperity. It belonged originally to the states, has never been surrendered to the government nor directly restrained, and is essentially exclusive. * * * In short, it is not to be doubted that the power to make the ordinary regulations of police remains with the individual states and cannot be assumed by the national government, and in this respect it is not interfered with by the Fourteenth Amendment." He finds the commercial power exclusive "when the subjects of that power are national in their nature." Later he says: "If a law passed by a state in the exercise of its acknowledged powers comes into conflict with that will, Congress and the state cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy." If it is exclusive, the police power does not enter the sphere of congressional supremacy, but in allowing for this conflict, after having stated that the police power is exclusive, the court contradicts itself, and really makes the police power subject to the federal government. In the case of Clark Distilling Co. v. Western Maryland Ry. Co., 242 U. S. 311, the court held that a state might forbid all shipments of intoxicating liquors, and upheld the Webb-Kenyon Act of March 1, 1913, providing for this, whether the liquor was in the original package or not.

[60] 123 U. S. 623.

ment a state had lost none of its police power; (2) prohibiting or otherwise regulating liquor in the state is a valid exercise of the police power.[61]

The *Granger Cases* decided that where rates were set by the legislature there was no question for judicial review.[62] The overthrow of this proposition took place as follows: The State of Minnesota established a railroad commission to regulate rates of transportation. This commission was to have sole charge of the reasonableness of the rates. A case arose under this act and the railroad argued that the rates as set by the Commission were an unconstitutional deprivation of property. In this case, *Chicago, M. & St. P. Ry. Co.* v. *Minnesota,*[63] the court held itself bound by the state court's decision that rates set by the commission were final if the law was valid, but the court held, in reversing the decision, that in such a case the reasonableness of rates is a question for judicial review, and this question could be appealed on the ground that the question was one of law and not one of fact.[64]

In the case of *Reagen* v. *Farmers Loan and Trust Co.*[65] we again have rates set by a commission, but the court decided that whether the rates were set by commission or not, the subject of reasonableness of rates is a question for judicial review. The court having decided to review such legislation, which up to this point refers to

[61] The court in Powell v. Pennsylvania, 127 U. S. 678, upheld a law prohibiting the making or sale of oleomargarine colored to imitate butter.

[62] This principle was adhered to in Budd v. New York, 143 U. S. 517.

[63] 134 U. S. 418, 462.

[64] The court said: "It deprives the company of its rights to an investigation by due process of law. * * * The question of reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination." This review of reasonableness seems to be confined to the fixing of rates, for in the case of New York & N. E. Ry. Co. v. Bristol, 151 U. S. 556, the court upheld a law authorizing a railroad commission to require, under certain conditions, grade crossings to be removed and replaced. The court seems to indicate that it will refuse to look into the reasonableness of a police act which has been affirmed by the state courts, when the provisions of the act are confined to health, safety and morals. Here we see a similarity to the rule advanced in New Orleans Water-Work Co. v. Rivers.

[65] 154 U. S. 362.

intrastate commerce, had to determine what a reasonable rate is. This was done in *Smyth* v. *Ames*.[66] This case overturned *Munn* v. *Illinois* so far as it refers to railroads, for a railroad business is an object of public interest, and as it has to serve the public on fair terms, railroad property is quasi-public property. The court will see to it that no rates are set so low as to prevent a fair return, for otherwise confiscation would take place. A fair return is the current rate of interest on the value of property that is used for the public.[67]

It might be well to complete here the discussion of the legality of a state fixing railroad rates. *Smyth* v. *Ames* provided for some separation between intrastate and interstate commerce. The difficulties in the way of such a separation led the court to suggest in the *Minnesota Rate Cases*[68] that the two were so blended as perhaps to make it necessary for Congress to regulate both in order to have effective regulation, but that in absence of congressional action the states were free to set maximum intrastate rates for interstate carriers. Furthermore, in this case a reasonable rate was described as one which gives a fair return on the value of the property, and such value includes the current rate of interest on the value of a going concern, less deterioration. The *Shreveport Rate Case*[69] decided positively that in regulating interstate commerce Congress, through the Interstate Commerce Commission, could regulate any

[66] 169 U. S. 466.

[67] "We hold, however, that the basis of all calculations as to reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stocks, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered are reasonably worth."

[68] 230 U. S. 352.

[69] 234 U. S. 342.

intrastate rates which were discriminatory. From this we are able to see that when commerce enters the field the police power leaves. With regard to railroads, *Munn* v. *Illinois* is overturned, but with regard to other businesses only the provision that the reasonableness of such regulations is not subject to judicial review has been overturned.

The court has repeatedly held that a legislature has wide discretion in classifying objects with which it may interfere on the grounds of preserving the public health, safety and morals.[70] A state may pick out the business which it will regulate. Regulations have been passed affecting the milk business,[71] requiring a railroad company to move the foundation of a bridge so as to widen the channel,[72] requiring all physicians to register,[73] forbidding burial of dead within city limits;[74] making a telegraph company liable for damages suffered by a sender if his telegram is not delivered;[75] fix-

[70] Lawton v. Steele, 152 U. S. 133. "Whenever the public interest demands it, and in this particular a large discretion is vested in the legislature to determine not only what the interests of the public require but what measures are necessary for the protection of such interests."

[71] N. Y. ex rel. Lieberman v. Van De Carr, 199 U. S. 552. In upholding this regulation affecting the milk business, Justice Day said: "Nor do we think there is force in the contention that the plaintiff in error has been denied the equal protection of the laws because of the allegation that the milk business is the only business dealing in foods which is thus regulated by the sanitary code. * * * It is primarily for the state to select the kinds of business which shall be subjects of regulation, and if the business affected is one which may be properly the subject of such legislation, it is no valid objection that similar regulations are not imposed upon other businesses of a different kind."

[72] Chicago, B. & Q. Ry. Co. v. Illinois, 200 U. S. 561.

[73] Watson v. Maryland, 218 U. S. 173. "Police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern public health. * * * Classification of the subjects of such legislation, so long as such classification has a reasonable basis and is not merely arbitrary selection without real difference between the subjects included and those omitted from the law, does not deny to the citizens the equal protection of the laws," citing Williams v. Arkansas, 217 U. S. 79, which upheld a law prohibiting a certain class of drumming or soliciting of business on trains.

[74] Laurel Hill Cemetery v. City and County of San Francisco, 216 U. S. 358.

[75] Western Union Telegraph Co. v. Commercial Milling Co., 218 U. S. 406.

ing maximum rates of interest;[76] requiring every state bank to contribute to bank depositors' guaranty fund;[77] requiring two feet of space on outside of rails of coal mines;[78] fixing weight of standard loaf of bread.[79]

These are but a few of many specific regulations placed by the state on private business affecting public interest, all of them upheld by the Supreme Court as coming within the police power of the state. In the case of the *German Alliance Insurance Co.* v. *Lewis*[80] the court went even further. Here it was decided that a business may be so far affected with a public interest as to permit legislative regulation of its rates and charges, although no public trust is imposed upon the property and although the public may not have a legal right to demand and receive service, and that the business of fire insurance is so far affected with a public interest as to justify legislative regulation of its rates.

One of the main restrictions on the state in the exercise of this power is the definition of liberty given by the Supreme Court in the case of *Allgeyer* v. *Louisiana.*[81] Liberty is broadly defined as

> "not only the right of the citizen to be free from mere physical restraint of his person, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper or necessary and essential for his carrying out to a successful conclusion the purposes above mentioned."

Even this liberty may at times be trampled on; for instance, it does not prevent a man from being vaccinated against his will.[82]

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[76] Griffith v. State of Connecticut, 218 U. S. 563.

[77] Noble State Bank v. Haskell, 219 U. S. 104.

[78] Barrett v. Indiana, 229 U. S. 26.

[79] Schmidinger v. Chicago, 226 U. S. 578.

[80] 233 U. S. 389.

[81] 165 U. S. 578.

[82] Jacobson v. Massachusetts, 197 U. S. 11. The court cites Hannibal & St. J. Ry. Co. v. Husen, 95 U. S. 465, and Thorpe v. Rutland, 27 Vt. 140: "Persons and property are subject to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the state; of

With regard to monopolies the court has decided that a state may not regulate a business on the basis that while a perfectly reasonable charge is made so far as value of services rendered is concerned, yet if the business grows large profits from the charges may be cut. A state may regulate the business as a whole, but it cannot distinguish between a large and a small business.[83]

There is one other point of importance which must be touched upon. By *Eubank* v. *Richmond*[84] it was decided that the police power does not extend to æsthetic considerations.[85] But in a very recent decision[86] the court seems inclined to broaden the police power to cover this field if policy can be found to support it.[87]

From this discussion two or three points seem evident. It is clear that the court is very jealous of the congressional power over interstate commerce, but it is equally evident that even though interstate commerce prevails as against the police power, the court has looked upon the police power very favorably when other businesses are to be regulated.

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the perfect right of the legislature to do which no question ever was or upon acknowledged general principles ever can be made, so far as natural persons are concerned."

[83] Cotting v. Kansas City Stock Yards Co., 183 U. S. 79. A general rule for the regulation of monopolies on that part of the state was laid down in Waters-Pierce Oil Co. v. Texas, 212 U. S. 86. In this case it was decided that a state legislature may provide their own methods of procedure and determine the methods and means by which their legislation may be made effective, subject only to the qualifications that this procedure must not work a denial of fundamental rights, or conflict specifically with provisions of the Federal Constitution. The fixing of fines, so long as they are not grossly excessive, is also within the police power of the state.

[84] 226 U. S. 137.

[85] "Æsthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation."

[86] St. Louis Poster Advertising Co. v. City of St. Louis, 249 U. S. 269.

[87] Justice Holmes, in upholding a law regulating billboards, said: "It is true that according to the bill the plaintiff has done away with dangers from fire and wind, but apart from the question whether those dangers do not remain sufficient, they are or may be the least of the objections adverted to in the cases." This seems to indicate a tendency to broaden police power to æsthetic purposes if policy can be found to support it. "Possibly one or two details * * * have æsthetic conditions in view more than anything else. But as the main burdens stand on other grounds," etc.

THE POLICE POWER AND RACE LEGISLATION

Anyone who is at all familiar with the history of the War between the States and Reconstruction realizes that the Thirteenth, Fourteenth and Fifteenth Amendments were passed in order to establish the political equality of the negroes. The amendments have been of great importance in other respects, but so far as they have been used with reference to negro legislation they have primarily affected the South, against which they were directed. It has been very fortunate for that section that the Supreme Court has given the police power such a wide range, and due to this power the South has so far been able to ward off the danger arising from her large negro population.

Cases affecting the negroes were much more numerous forty years ago than today, and the court thought then that few cases which did not refer to negro legislation[88] would come before them under the amendments. This was a mistaken idea, for because of such legislation many interesting and important cases have come before the court. The court has, as I have said, made liberal allowance for this legislation. Perhaps no case shows this more clearly than *United States* v. *Reese*.[89] Here an act of Congress fixing punishment for hindering voting under the Fifteenth Amendment was declared unconstitutional because it did not distinguish between discrimination on account of color and other discrimination. The court stated that the power of Congress to act on this subject extended only to race discrimination.

The same principle won in the case of *United States* v. *Cruikshank*.[90] Here the defendants were charged with having violated a federal law that no people should intimidate others so as to hinder them in the exercise of their rights. The defendants were brought before the court on thirty-two counts—preventing persons from bearing arms, depriving them of liberty, etc. The court admitted

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[88] In the Slaughter-House cases, Judge Miller said: "We doubt very much whether any action of a state not directed by way of discrimination against the negro as a class or on account of their race will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency that a strong case will be necessary for its application to any other."

[89] 92 U. S. 214.

[90] 92 U. S. 542.

that for some offenses a man might be amenable to both nation and state, but the offenses as charged were waived aside on the ground that the protection of the citizens of a state rests with the state, that discrimination on account of race was not shown, and that the proof was too vague to allow conviction.

In *Hall* v. *DeCuir*[91] we find the beginning of the decisions by which separate travel accommodations for the races has been upheld. Louisiana had enacted a law that no one should be refused admission to or expelled from a public conveyance because of race. Mrs. DeCuir was refused admission to cabins reserved for white ladies, and for this she sued the owner of the steamboat. The court decided that such a law was an interference with the power of Congress over interstate commerce, and as such there was no ground for suit.[92]

With regard to jury service we have three interesting cases. In *Strauder* v. *West Virginia*[93] it was decided that a man convicted under a discriminatory jury law is denied the "equal protection of the law." In *Virginia* v. *Rives*[94] it was held that a person is not entitled to trial by a jury composed in part of his own race. Judge Field's concurring opinion is of importance, for it foretold the downfall of the civil rights legislation by Congress. He held that an act of Congress attempting to give the United States courts jurisdiction to enforce state laws is unconstitutional. In *Ex parte Virginia*[95] an act of Congress providing that an officer who discriminately selects jurors should be fined was held to be unconstitutional on the basis that it interfered with the purely local concerns of a state.

The *Civil Rights Cases*[96] completed the overthrow of the Second Civil Rights Bill. Two of these cases arose because colored per-

[91] 95 U. S. 485.

[92] Chief Justice Waite said: "But we think it may be safely said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon business through local instruments to be employed after coming within the state, but directly upon the business as it comes into or goes out from within."

[93] 100 U. S. 303.

[94] 100 U. S. 313.

[95] 100 U. S. 339.

[96] 109 U. S. 3.

sons were refused hotel accommodations;[97] two, because negroes were refused accommodations in theatres;[98] and the fifth, because a negro woman was refused the privilege of riding in the ladies' car.[99] The court decided that in none of these cases was there ground for action, because the three amendments were prohibitions on states and not on individuals.[100]

In the *Ku Klux Cases*[101] the court decided that the amendments conferred no right of suffrage. Congress, however, could still guard against discrimination and protect people from such discrimination.[102]

In *Plessy* v. *Ferguson*[103] the court upheld a law requiring separate coaches for white and colored passengers, saying that the Fourteenth Amendment could not "enforce social equality or a commingling of the two races on terms unsatisfactory to either." The test of such a law is reasonableness, and with regard to this the legislature has wide powers. In such a test the customs of the people have much to do with the decision.[104] Such a law, so long as equal accommodations are given, does not place one race in an

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[97] U. S. v. Stanley and U. S. v. Nichols, 109 U. S. 3.

[98] U. S. v. Ryan and U. S. v. Singleton, 109 U. S. 3.

[99] Robinson and Wife v. Memphis, etc., Ry. Co., 109 U. S. 3.

[100] Justice Bradley in rendering the decision said: "It does not authorize Congress to create a code of municipal law for the regulation of private rights, but to provide a mode of redress against the operation of state laws and the action of state officers, executive and judicial, when these are subversive of the fundamental rights specified in the amendment." The reason for such a broad view being taken at this time may be found in the fact that the democrats had just returned to power, and no longer was there danger of anti-southern legislation on the part of Congress.

[101] 110 U. S. 651.

[102] These cases followed Minor v. Happersett, 21 Wall. 162, 178, where it was decided that the amendments did not give women the right to vote.

[103] 163 U. S. 537. The Supreme Court has held closely to the doctrine of this case. The most recent decision is Cincinnati, Covington & E. St. Ry. Co. v. Kentucky, 252 U. S. 408.

[104] The court said: "So far as conflict with the Fourteenth Amendment is concerned the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort and the preservation of public peace and good order."

inferior position.[105] The case of *Chiles* v. *C. & O. Ry. Co.*[106] extended the above principles. Here it was decided that in absence of statutory authority a carrier may lawfully separate the races even in interstate transportation, and that if general sentiment supports a law it cannot be considered unreasonable.[107]

The court seems to make a distinction between the rights which the police power may affect. 'Jim Crow' legislation has been upheld because it is not discriminatory; but segregation ordinances, although general sentiment certainly supports them, are illegal, and as the Constitution supports the right to "acquire, use, and dispose of" property, a city ordinance preventing a negro from living in a block where the majority of the people are white is unconstitutional as a violation of the clause that no "person shall be deprived of property without due process of law."[108] It is evident that at present the court will uphold legislation of a racial character so long as it is not perfectly clear that the legislation does not expressly violate some constitutional provision.

Legislation regarding aliens has been put on the same basis. Where there is no distinct violation of a constitutional provision the

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[105] In Berea College v. Commonwealth, 211 U. S. 45, it was decided, on the grounds of Plessy v. Ferguson, that a state might prohibit private schools and colleges from teaching the two races at the same time and place.

[106] 218 U. S. 71.

[107] "Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate cannot be said to be unreasonable."

[108] Buchanan v. Warley, 245 U. S. 60. The court said that the exercise of the police power "is not to be interfered with by the courts where it is within the scope of legislative authority and the means adopted reasonably tend to accomplish a lawful purpose. But it is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution." The court quotes Carey v. Atlanta, 143 Ga. 192, where, in speaking of Plessy v. Ferguson and Berea College v. Commonwealth, it was said: "In each instance the complaining person was afforded the opportunity to ride, or to attend institutions of learning, or afforded the things of whatever nature to which in the particular case he was entitled. The most that was done was to require him, as a member of a class, to conform with reasonable rules in regard to the separation of the races. In none of them was he denied the right to use, control or dispose of his property, as in this case. Property of a person, whether as a member of a class or as an individual, cannot be taken without due process of law."

states may legislate on the subject by virtue of their police power. In *Chy Lung* v. *Freeman*[109] the court had before it a law of California requiring that certain classes of foreigners, among them lewd women, should give bond on arrival to indemnify the state against liability for their support for two years. The court finds that America would stand no such action on the part of other countries, and that the control of such a subject lies with Congress; but that in absence of congressional action a state may protect itself in case of great emergency.[110] In *Yick Wo* v. *Hopkins*[111] the court held that a law requiring that no one should carry on a laundry business without permission was invalid. The court reached this conclusion, not because of anything inherently unconstitutional in the law, but because the board that gave licenses had for no legal reason withheld them from all Chinese applicants, and the court held that when such a law is administered in an unequal and oppressive fashion a denial of equal justice as protected by the Constitution takes place.

In *Patsone* v. *Pennsylvania*[112] the court held that an act making it unlawful for any alien to own a shotgun or rifle was constitutional. This law made it unlawful for any alien to kill any wild bird or animal except in defense of person or property, and was upheld on the ground that a state has wide powers of classification and may pass acts against that class from whom the evil is mainly to be feared.

The last case which I shall mention in this connection is *Truax* v. *Raich*,[113] where the court declared a law, which happens to have been passed by the initiative and referendum, requiring employers of more than five persons to engage no more than 20 per cent aliens unconstitutional as denying to them as a class the equal protection of the laws.

In both negro and alien legislation an important consideration is

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[109] 92 U. S. 276.

[110] "Such a right can only arise from a vital necessity for its exercise and cannot be carried beyond the scope of that necessity. When a state statute limited to provisions necessary and appropriate to that subject alone shall in proper controversy come before us, it will be time enough to decide that question."

[111] 118 U. S. 356.

[112] 232 U. S. 138.

[113] 239 U. S. 33.

whether the law represents preponderant public opinion and is a necessary exercise of the police power. But in either case if the law is a violation of some constitutional clause it does not stand.

The Police Power and the Relation of Employer and Employee

We come now to the newest development of the police power. Because of the conditions at the time, the police power early in its history was bound up with the slavery question. After the war it was primarily called up in cases of rate and negro legislation. At the present time trade unionism and other labor problems occupy the center of the stage, and that most useful power, the police power, has been called upon to unravel the difficulty.

The case of *Barbier* v. *Connolly*,[114] while it does not refer to the relation of employer and employee serves as a basis for many of the later decisions. Here a law prohibiting washing in public laundries from ten P. M. to six A. M. was upheld on the ground that this law was a valid exercise of the police power in that it was passed for purposes of health and safety.[115] The police power has had the effect of limiting the freedom of both employer and employee on the ground that an employee does not stand on an equal basis with the employer in bargaining for conditions of work, and that such regulation of their relations as promotes public health, safety and morals is constitutional. Up to 1898 we had decisions enforcing restrictions against producers in behalf of consumers, but from then on the health of the producer becomes a matter of public interest. Thus was liberty in making a contract restricted. In this year the case of *Holden* v. *Hardy*[116] came before the court, and in rendering a decision the court came to the conclusion that an eight-

[114] 113 U. S. 27.

[115] "But neither the amendment (Fourteenth), broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations, to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character having in view these objects must often be had in a certain district, such as draining marshes and irrigating arid plains; special burdens are often necessary for general benefits."

[116] 169 U. S. 366.

hour law for miners was constitutional as being a measure for the promotion of health, for while in ordinary employment men might work a longer time, yet in such occupations as mining a man cannot work for long hours without injury.[117] The court, however, felt it necessary to explain that it took this action because of new conditions.[118]

In order to protect the employee the court in the case of *St. Louis, Iron Mt. & S. Ry. Co.* v. *Paul*,[119] upheld a law requiring railroads

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[117] "If it be within the power of the legislature to adopt such means (ventilation, etc.) for the protection of the lives of its citizens, it is difficult to see why precaution may not also be adopted for the protection of their health and morals. It is as much for the interest of the state that public health should be preserved as that life should be made secure. * * * While the general experience of mankind may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to health, it does not follow that labor of the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases generated by the process of refining and smelting."

[118] In this connection the court said: "This court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some of the states methods of procedure which, at the time the constitution was adopted, were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, have proved detrimental to their interests, while, upon the other hand, certain other classes of persons have been found to be in need of additional protection. * * * It is impossible to forecast the character or extent of these changes; but in view of the fact that, from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adopt itself to new conditions of society, and particularly to the new relations between employers and employees, as they arise."

[119] 173 U. S. 404. This idea of protecting the employee through the police power has extended to other employments in the matter of wages, until a state can make very nearly what rate regulation it pleases. In Mutual Loan Co. v. Martell, 222 U. S. 225, the court decided that a law invalidating the assignment of future wages without consent of the wage-earner's wife and employer did not deprive the man of due process of law. In Rail and River Coal Co. v. Yaple, 236 U. S. 338, it was held that a law under which coal miners, who are paid on the basis of weight, must be paid according to all coal contained in the mine car in which it has been removed from the mine,

to pay at contract rates a discharged employee on the day of his discharge. This decision was based on the fact that railroads, being clothed with a public trust, are under obligations to discharge duties which affect the public at large, and that in furtherance of public interest state legislatures might make laws for the benefit of employees, even though such laws limited the right of freedom of contract.

In *Atkin* v. *Kansas*[120] a law establishing an eight-hour day for both direct and contract work in public employments was upheld on the ground that a state can prescribe conditions of work done for it or for its municipalities.[121] Similar decisions have been given with regard to restriction of hours of railroad employees, for the railroad business affects public safety.[122] If legislation of this kind made by a state conflicts with that made by Congress, the state legislation falls.[123] The upholding of the Adamson law[124] was based by the court on the principle that the law was an extension of hour legislation to all interstate railroad employees. The regulation of Congress naturally extends only to those employed in interstate commerce and to those employed by the government.

While a state might regulate hours of work in non-dangerous

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provided no greater per cent of dirt, etc., shall be contained than is avoidable, and providing that the system of docking is not done away with, does not violate the right to enter into contract. In McLean v. Arkansas, 211 U. S. 539, it was decided that a legislature may prescribe particular methods of compensation. Chicago, B. & Q. Ry. Co. v. McGuire, 219 U. S. 549: By police power reasonable restraints may be placed on the freedom of contract.

[120] 191 U. S. 207.

[121] "It belongs to the state, as guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit work to be done on its behalf or on behalf of its municipalities."

[122] B. & O. Ry. Co. v. Interstate Commerce Commission, 221 U. S. 612: "In its power suitably to provide for the safety of employees and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider and to endeavor to reduce the dangers incident to the strain of excessive hours of duty on the part of engineers," etc.

[123] Erie Ry. Co. v. N. Y., 233 U. S. 671: "Where there is a conflict the state legislation must give way. Indeed, when Congress acts in such a way as to manifest its purpose to exercise its constitutional authority the regulating power of the state ceases to exist."

[124] Wilson v. New, 243 U. S. 332.

public employments, the court did not at once come to the conclusion that it could do so in private employments. In *Lochner* v. *New York*[125] the court held that a law restricting hours of work in a bakery was unconstitutional. This case differs from *Holden* v. *Hardy* in that here there is no hazardous employment. The burden of proof is placed on the state in defending a law which affects liberty as defined in *Allgeyer* v. *Louisiana*. The police power could be called upon to support only a law referring to public health, safety and morals. But in the case of *Bunting* v. *Oregon*[126] the *Lochner* case, except for unusual violations of liberty, was overthrown. Here a law limiting men's hours of work to ten hours a day in general factory work was upheld. The court had to be convinced that such a law was supported by general public opinion and that it was for the general welfare of the community. So a state may now bring forward police power, including general welfare, in support of its hours of work legislation.

The court has been more liberal in enforcing laws regulating hours of work of women, and here they have taken into consideration that in the case of women long hours are likely to prove very detrimental. In *Muller* v. *Oregon*[127] a ten-hour law for women working in mechanical establishments, factories or laundries was upheld as being a health measure.[128] In *Miller* v. *Wilson*[129] this principle was adhered to and a law forbidding women to work more than eight hours a day in hotels was upheld, despite the plea of class legislation and discrimination. The court, however, admitted that such legislation might go beyond the bounds of reason, but they held this to be a reasonable regulation. Thus, we see that the right to enter freely into a contract has been restricted through the

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[125] 198 U. S. 45.

[126] 243 U. S. 426.

[127] 208 U. S. 412.

[128] "As healthy mothers are essential to vigorous offspring, the physical well-being of women becomes an object of public interest and care in order to preserve the strength and vigor of the race. * * * The limitation which this statute imposes upon her contractual powers, upon her right to agree with her employer as to the time when she shall labor, are not imposed solely for her benefit, but also for the benefit of all."

[129] 236 U. S. 373.

police power of the state on the ground that a state must protect its citizens who are employed.

It has become established that an employer may not be prevented from discharging a man because of union membership. The question first came up in *Adair* v. *United States*.[130] An act of Congress declaring that no man engaged in interstate commerce might be discharged because of union membership was held to be unconstitutional because violating liberty as protected by the Constitution. A state law of the same nature was held to be unconstitutional in the case of *Coppage* v. *Kansas*.[131] The court has also held that where a man has signed an agreement stating that he will not join a union all efforts made to persuade him to join are illegal.[132]

The most recent development of legislation by virtue of the police power is found in the various compensation and employer's liability acts. Maryland adopted the first of these acts in 1902, and two years later it was declared unconstitutional by the state court.[133] The first general law was enacted by New York in 1910. This law provided for compulsory compensation in certain hazardous employments. In the case of *Ives* v. *South Buffalo Ry. Co.*[134] the constitutionality of the law was tested in the state court. The court held, as did the United States Supreme Court at this time,[135] that a state legislature might modify the three common law defenses of con-

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[130] 208 U. S. 161.

[131] 236 U. S. 1. "A statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same act with a police regulation or by being enacted under a title that declares a purpose which would be a proper object for exercise of that power. * * * Mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare' and treated as a legitimate object of police power."

[132] Hitchman Coal and Coke Co. v. Mitchell, 245 U. S. 229.

[133] Franklin v. Union Rys. and Electric Co. of Baltimore (Not reported. See BRADBURY, WORKMEN'S COMPENSATION, Ed. 2, vol. 1, p. 9).

[134] 201 N. Y. 271.

[135] L. & N. v. Melton, 218 U. S. 36. The court upheld a law making railroad companies liable for injuries to an employee resulting from negligence of a fellow employee under whom he was working. Chicago B. & Q. Ry. Co. v. McGuire, 219 U. S. 549: The court upheld a law abolishing the fellow servant rule on railroads and denying effect to any contract restricting liability or acceptance of any insurance brought against the railroad by their employees.

tributory negligence, assumption of risk, and the fellow servant doctrine, and it also held that classification for purposes of regulation under the police power is a legislative function, and cannot be interfered with unless it is so unreasonable as to violate the Constitution. But the court held that as this law in part provided a mandatory rule, and that it takes the property of the employer without regard to whether he was at fault or not, it is unconstitutional.

The *Second Employers' Liability Cases*[136] followed former cases as to the legality of modifying common law defenses, and decided that Congress could regulate the liability of common carriers by railroad to their employees, and that such regulation extended to the intrastate commerce of interstate carriers, and that such regulation superseded all state regulations. The case of *C. & O. Ry. Co.* v. *De Atley*[137] decided that it was not a part of an employee's duty to discover extraordinary risks.[138] The final development of the principles determining the constitutionality of compensation laws took place in 1917. In the case of *New York Central Ry. Co.* v. *White*[139] the court decided that a compulsory compensation law which, in lieu of common law liability upon employers to make compensation for disabling, etc., workers, except where injury is willful or the worker drunk, is constitutional.[140] The decision in the case of *Mountain Timber Co.* v. *Washington*[141] follows the above decision.

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[136] 223 U. S. 1.

[137] 241 U. S. 310.

[138] In the case of Chicago, R. I. & P. Ry. Co. v. Ward, 252 U. S. 18, this case was followed. The court said: "According to our decisions the settled rule is not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them."

[139] 243 U. S. 188.

[140] A law "regulating the responsibility of employers for injury or death of employees, arising out of the employment, bears so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations."

[141] 243 U. S. 219.

CONCLUSION

Mr. Hastings, in summing up his article, says:

> "The suggestion of Marshall was put forward to serve a need to enable the slave states to minister to their peculiar institutions, while national authority was nevertheless enforced. It was done almost involuntarily by judges who used it because it lay at hand and was available. Then it was used in the states to resist extravagant claims of property and corporate rights and to extend restraints over the liquor traffic. After the Civil War it was needed again for the same purpose to enable the states to maintain their autonomy against the reconstruction legislation of Congress and the new amendments; and, again, it was involuntarily seized upon and crowded into the gap.
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> "In such use it was so wrought upon legislation that it finally triumphed over the bill of rights almost completely, but the Fourteenth Amendment, almost wholly balked by our legal habits of its intended effect as to the negro race, was turned by those habits to the accomplishment of purposes in relation to property and legislation that the framers of it did not remotely conceive."

To this we might add that as the labor situation has become more and more acute the police power has been stretched to the point where not only hours of labor are regulated by it, but the old common law defenses by which an employer might protect himself have been rendered useless,[142]

The police power has served the states well, and through it they

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[142] In the case of Arizona Copper Co. v. Hammer, 250 U. S. 400, the court said: "The decisions (Second Employer's Liability Cases, N. Y. Central Ry. Co. v. White and Mountain Timber Co. v. White) have established the propositions that the rules of law concerning the employer's responsibility for personal injury or death of an employee arising in the course of the employment, is not beyond alteration by legislation in the public interest; that no person has a vested right entitling him to have these any more than other rules of law remain unchanged for his benefit; and that if we exclude arbitrary and unreasonable changes, liability may be imposed upon the employer without fault, and the rules respecting his responsibility to one employee for the negligence of another, and respecting contributory negligence and assumption of risk, are subject to legislative change."

have been able to maintain their authority. By it the South was able to preserve her civilization, and only through it can she hope to ward off the terrible danger of partial and in some cases complete negro control. The founders of our Constitution never expected such a condition to arise as that in which the South is now placed. Had they foreseen it the Constitution would never have been adopted without provisions to protect the Southern States. The Supreme Court to the best of its ability has filled their places. But in other respects, particularly with reference to property rights and other constitutional guarantees, the states have been given a tremendous amount of power. The acts passed by virtue of the police power are legal, and when police power is held to contain "what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare" the outcome is hard to see. Particularly at this time, when radicalism and Bolshevism are preponderant, our constitutional provisions vanish should opinion suddenly or even gradually change. Justice Strong foresaw this condition of affairs when he dissented in the decision rendered in the case of *Munn* v. *Illinois*. In speaking of the effects of this decision, he said:

> "If this be sound law, if there be no protection, either in the principles upon which our republican government is founded or in the prohibitions of the Constitution against such invasion of private rights, all property and all business in the state are held at the mercy of the majority of the legislature."

When we see a portion of the world gone over to sovietism, and we hear the increasing cry for socialism in this country, we cannot do better than turn back to the words of Chief Justice Marshall:

> "Whatever respect might have been felt for the state sovereignty, it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effect of those sudden and strong passions to which men are exposed."

(All reference to the recent growth of a national police power as developed in *Arver* v. *United States,* 245 U. S. 366, *Hamilton* v. *Kentucky Distilleries and Warehouse Co.,* 251 U. S. 146, and *Ruppert* v. *Caffey,* 251 U. S. 264, has been purposely omitted. This growth has taken place in connection with other changes wrought by the war, and whether it will survive or not remains to be seen.)

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